

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSEPH V. DiFELICE, JR.,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 02-3641
v.	:	
	:	
AETNA/U.S. HEALTHCARE, <u>et al.</u>,	:	
	:	
Defendants.	:	

**DEFENDANT AETNA/U.S. HEALTHCARE’S REPLY BRIEF IN
SUPPORT OF MOTION TO DISMISS**

On August 31, 2004, Defendant Aetna/U.S. Healthcare (“Aetna”) filed a Rule 12(b)(6) Motion to Dismiss the sole remaining claim against Aetna in Plaintiff Joseph V. DiFelice’s Complaint -- concerning Aetna’s alleged negligent refusal to cover a continuing Hospital stay at Chester County Hospital. (Civil Docket No. 16). The two grounds supporting this Motion to Dismiss are, first, the intervening Supreme Court Decision, Aetna Health Inc. v. Davila, 124 S.Ct. 2488, 159 L.Ed. 2d 313 (2004); and, second, DiFelice’s remaining “length of hospitalization” claim was preempted under Section 514 of ERISA. (Aetna’s Brief at 1).

On September 13, 2003, DiFelice filed a “Response” to Aetna’s Motion to Dismiss. (Civil Docket No. 17). He did not file substantive opposition papers. Rather, DiFelice, in his Response, stated that he had forwarded to Aetna’s counsel a “Stipulation to Dismiss all claims and cross-claims” against Aetna only. DiFelice further stated that, in light of the anticipated execution, by all parties, of the Stipulation of Dismissal, this Court should deny Aetna’s Motion to Dismiss as “moot.” (Id. at Doc. No. 17).

DiFelice, however, instructed Aetna to forward the Stipulation to co-Defense counsel, for signatures and filing, without stating that he had obtained co-Defense counsels’ agreement to execute the Stipulation.

Aetna’s co-Defendants, however, have neither executed the Stipulation of Dismissal nor confirmed that they will do so. Co-Defendant Chester County Hospital’s counsel, Cathy Wilson Huzzard, Esquire, informed Aetna’s counsel that she will not sign, on behalf of the Hospital, the Stipulation of Dismissal at this time. Counsel is still pondering her decision.

Michael O. Pitt, Esquire, counsel for Drs. Picariello, Fowler and the Ear, Nose & Throat Assc. of Chester County, Inc., has not returned phones calls, from Aetna’s counsel, requesting that he execute, on behalf of his clients, the Stipulation of Dismissal. Mr. Pitt has not indicated one way or another whether he will sign the Stipulation of Dismissal.

In light of Aetna's Co-Defendants' failure, as of this time, to execute, or agreement to execute, the Stipulation of Dismissal, Aetna requests that this Court **not** deny its Motion to Dismiss as "moot," but, rather, decide its unopposed Motion to Dismiss under applicable ERISA preemption law.

Accordingly, in light of Aetna's Co-Defendants' failure to execute, or agreement to execute, the Stipulation of Dismissal, Aetna respectfully requests that this Court grant the **unopposed** Motion to Dismiss.

Respectfully submitted,

POST & SCHELL, P.C.

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Dated: September 16, 2004

CERTIFICATE OF SERVICE

I, Jonathan B. Sprague, Esquire, certify that on this date I had served upon all counsel listed below DEFENDANT AETNA/U.S. HEALTHCARE'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS by first class mail and/or electronic mail:

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Dated: September 16, 2004